

JUL 24 1998

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-01721

COUNSEL: [REDACTED]

HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

1. He be reinstated in the U. S. Air Force in the grade of major.
2. He receive back pay and allowances from the date of discharge to the date of reinstatement.
3. He be given credit for time in grade from the date of discharge to the date of reinstatement for pay, promotion and retirement purposes.
4. Or, in the alternative, he be given early retirement with credit for active duty time to the date of his early retirement; or, alternatively, that he be allowed to elect Voluntary Separation Incentive/Special Separation Bonus (VSI/SSB).

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APPLICANT CONTENDS THAT:

Counsel for the applicant states that applicant was found, by a preponderance of the evidence, to have engaged in serious or recurring misconduct based almost exclusively upon the testimony of a witness who is, and was an admitted liar and whose credibility, or lack thereof, could not and did not sustain proof by a preponderance of the evidence. Counsel states that the government failed to establish, by a simple preponderance of the evidence that applicant had (1) Solicited to suborn perjury; (2) Obstructed justice; (3) Violated an order; and, (4) Solicited to suborn perjury. If one then eliminates those charges leveled by the complaining witness, what we have is an officer with a drinking problem who was never given alcohol rehabilitation treatment. He therefore deserves and is entitled to the relief requested.

In support of his appeal, applicant submits a copy of a statement from a female witness recanting a first recantation in sworn testimony at a Board of Inquiry (BOI).

Applicant's and counsel's submission is attached at Exhibit A.

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STATEMENT OF FACTS:

Applicant was appointed a second lieutenant in the Reserve of the Air Force on 28 September 1979 and ordered to extended active duty for a period of 48 months.

He was subsequently appointed a captain in the Regular Air Force on 18 December 1985 and promoted to the grade of major with date of rank (DOR) of 1 May 1991.

While serving in the grade of major, the Wing Commander notified applicant on 2 June 1993, that he was initiating action under AFR 36-2, Chapter 3, paragraph 3-7d. The commander stated that he was taking action because of applicant's serious or recurring misconduct punishable by military or civilian authorities, specifically: During the months of May and June of 1992, applicant wrongfully had sexual intercourse with [REDACTED], the wife of a noncommissioned officer in the USAF. During the same period, applicant physically assaulted [REDACTED] by striking her on the head, arm and face, pulling her hair and pushing her to the ground. Applicant also wrongfully communicated to [REDACTED] threats to kill her. For this conduct, applicant received an Article 15 on 12 February 1993 with forfeitures of \$1728 pay per month for 2 months and a reprimand.

Applicant acknowledged receipt of the Letter of Notification on 2 June 1993. Applicant indicated that he understood that he was to contact the Area Defense Counsel to discuss procedures involved and his rights and options in this action. On 2 July 1993, applicant was counseled by his detailed defense counsel.

On 21 October 1993, applicant's commander added an addendum to the initial action under AFR 36-2 of 2 June 1993. The commander stated that the existing action under AFR 36-2 continues to be based on applicant's serious or recurring misconduct punishable by military or civilian authorities. The commander added more recent incidents of misconduct to serve as further bases for the action against the applicant. Specifically: (1) On or about 1 June 1993, applicant solicited [REDACTED], with the intent to deceive HQ AMC/CC, to make a false written statement recanting her prior truthful statements to the AFOSI and to the wing legal office. Applicant thereby induced her to commit perjury since the statement was later sworn to before a notary public at applicant's direction. Applicant received a Letter of Reprimand on 8 September 1993 for this misconduct. (2) On 14 September 1993, applicant was drunk on duty and engaged in conduct unbecoming of an officer. Applicant received an Article 15 on 17 October 1993. (3) On or about 3 September 1993 and on or about 12 September 1993, applicant contacted [REDACTED] in violation of a lawful written order, to refrain from any contact

with [REDACTED]. On 3 September 1993, applicant visited [REDACTED] at her residence, and applicant called her residence between on or about 4 September 1993 and on or about 12 September 1993. Applicant again attempted to persuade her to recant her accusations against him and to impede adverse administrative action against him by convincing her not to cooperate with Air Force officials. Applicant received a Letter of Reprimand on 28 September 1993.

On 22 October 1993, applicant acknowledged receipt of the addendum to the letter of notification of action under AFR 36-2. On 15 November 1993, applicant stated that he had been counseled by his detailed defense counsel.

The Air Mobility Command Vice Commander (AMC/CV), on 30 November 1993, notified the applicant of discharge action under AFR 36-2. The commander stated that after evaluating all information presented, found there was sufficient evidence to require applicant to show cause for retention on active duty for the reasons listed (attached). Applicant acknowledged receipt of the notification on 6 December 1993 and stated that he had been counseled by his detailed defense counsel and that he had not applied for voluntary retirement and had not tendered his resignation. Applicant indicated that he formally requested his case be processed under AFR 36-2 and that he intended to appear before the Board of Inquiry with his civilian counsel along with his detailed military defense counsel.

On 1 February 1994, applicant was notified that a Board of Inquiry (BOI) would convene on 15 February 1994 at March Air Force Base (AFB), California (CA), to receive evidence and make findings and recommendations as to whether he should be retained in the Air Force. Applicant acknowledged receipt of the BOI Notification on 1 February 1994.

A BOI convened under AFR 36-2 at March AFB, CA on 15 February 1994. The BOI found that applicant committed the following serious misconduct, as alleged in the notification letter and its addendum: (a) In September 1990, operated a vehicle on Norton AFB, CA, while drunk; (b) On divers occasions between May 1990 and June 1992, wrongfully had "sexual intimacy" with an enlisted man's wife, [REDACTED]; (c) Between September 1990 and July 1992, assaulted [REDACTED] by striking her on the head, arm and face, pulling her hair, and pushing her to the ground; (d) Between May 1990 and June 1992, wrongfully communicated threats to kill [REDACTED]; (e) In June 1993, solicited [REDACTED] to make a false written statement recanting prior truthful statements she had made against applicant; and, (f) In September 1993, was drunk on duty and engaged in conduct unbecoming an officer, to wit: while in uniform, having an obvious and offensive odor of alcohol on his person. The Board recommended that applicant not be retained in the Air Force and that he be discharged with a general discharge.

On 14 April 1994, the Deputy Staff Judge Advocate, HQ AMC/JA, stated that in their opinion, the case file is legally sufficient to support the general discharge of the applicant.

The Air Force Board of Review met at [REDACTED] on 16 May 1994 to consider applicant's case. Their determination was that applicant should not be retained on active duty and recommended that he be removed from active duty in the U. S. Air Force pursuant to AFR 36-12 and that he be discharged with a general discharge (under honorable conditions).

On 25 May 1994, the Secretary of the Air Force ordered that applicant be removed from active duty in the U. S. Air Force pursuant to AFR 36-12 and directed that he be discharged with a general discharge.

Applicant was discharged on 6 June 1994 under the provisions of AFR 36-12 (Involuntary Discharge: Misconduct) with a general (under honorable conditions) discharge. He served 14 years, 8 months and 9 days of active duty.

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AIR FORCE EVALUATION:

The Chief, Retirements Branch, HQ AFPC/DPPRS, states, in part, that members pending court-martial charges, under investigation, under civil court charges, notification of proposed action under Article 15, involuntary separation (for cause or promotion non-qualified) or separation under involuntary separation directives, are excluded from applying for separation or retirement under draw down programs. Applicant was not eligible for any draw down program. They recommend the application be denied.

A complete copy of the Air Force evaluation is attached at Exhibit C.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant's counsel submitted a letter, dated 3 November 1997, stating that he and the applicant agree that applicant was ineligible for favorable treatment due to the administrative action. However, they agree that by vitiating the administrative action, the Board can grant the relief requested.

A copy of counsel's letter is attached at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The Senior Attorney-Advisor, HQ AFPC/JA, states, in part, that evidence was presented at the Board of Inquiry (BOI) that applicant received three Article 15s. Also that he received a Letter of Reprimand for threatening and improperly influencing [REDACTED] into signing a sworn statement recanting her accusations against him, and that he received another Letter of Reprimand for again attempting to persuade [REDACTED] from testifying against him after having been ordered by his commander not to contact her.

[REDACTED] testified at the BOI and was cross-examined by applicant's counsel. She then testified that she wrote out a 1 June 1993 handwritten recantation at applicant's request, and that the statements she made in that document were not true. In support of applicant's request for relief, applicant now submits another notarized, handwritten, recantation dated 17 November 1994 by [REDACTED].

It was the BOI's responsibility to weigh all the evidence before making its findings and recommendations. In the opinion of the board members, all of the evidence, taken together, was sufficient to establish the validity of the grounds for the action against applicant. As a general proposition, recantation testimony is considered exceedingly unreliable.

Applicant's counsel stated applicant did have an alcohol problem that should have been treated. If he had an alcohol problem and now does not have one, he is left with the logical inference that rehabilitative effort such as his punishments under Article 15, imposition of Letters of Reprimand, and associated administrative actions, had the desired effect-he is now in control of his alcohol-related problems. While alcohol certainly played a role in at least some of the incidents leading to applicant's discharge, the administrative actions taken against applicant afforded him numerous opportunities at rehabilitation. HQ AFPC/JA recommends applicant's requests should be denied.

A complete copy of the Air Force evaluation is attached at Exhibit F.

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APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

A copy of the Air Force evaluation was forwarded to applicant and his counsel on 20 April 1998 for review and response within 30 days. As of this date, no response has been received by this office.

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THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After a thorough review of the evidence of record and applicant's submission, we are not persuaded that he should be reinstated in the Air Force in the grade of major with back pay and credit for time in grade; or in the alternative, that he be given early retirement and allowed to elect VSI/SSB. Applicant's and counsel's contentions are duly noted; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. The offices of the Air Force have adequately addressed the issues and we therefore agree with their recommendations and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden that he has suffered either an error or an injustice. Therefore, we find no compelling basis to recommend granting the relief sought.
4. The documentation provided with this case was sufficient to give the Board a clear understanding of the issues involved and a personal appearance, with or without counsel, would not have materially added to that understanding. Therefore, the request for a hearing is not favorably considered.

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THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

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The following members of the Board considered this application in Executive Session on 23 June 1998, under the provisions of AFI 36-2603.

Mr. Wayne R. Gracie, Panel Chair  
Mr. Dana J. Gilmour, Member  
Mr. Allen Beckett, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 24 May 97, w/atchs
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ AFPC/DPPRS, dated 13 Oct 97.
- Exhibit D. Letter, AFBCMR, dated 13 Oct 97.
- Exhibit E. Counsel's Letter, dated 3 Nov 97.
- Exhibit F. Letter, HQ AFPC/JA, dated 23 Mar 98.
- Exhibit G. Letter, AFBCMR, dated 20 Apr 98.

*Wayne R. Gracie*

WAYNE R. GRACIE  
Panel Chair